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No. 84-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *Et Al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY OF NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

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In response to the petition for certiorari filed by New England Telephone and Telegraph Company, the Maine Public Utilities Commission has filed a response stating (p. 1) that Maine "does not oppose" certiorari in this case in view of the importance of the controversy and the conflict between the circuits. However, Maine goes on to cite other enforcement cases pending in this Court and elsewhere and asserts that certiorari should be granted in the present case "if" this Court determines to hear other cases cited in the response. Response, p. 3. This reply is filed to answer Maine's apparent suggestion that review in this case may be contingent on review of other cases.

In the array of cases cited by Maine in its response, there is only a single issue on which a conflict exists among the circuits,

and only two cases now pending in this Court present the conflict. That issue is whether Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), embraces an FCC order in a rulemaking proceeding.[1] In the decision below, the First Circuit said that Section 401(b) does not embrace such orders; and in the *Louisiana* case, the Fifth Circuit held that Section 401(b) does embrace such orders, in addition to deciding a number of other issues on which no conflict exists.[2]

The other cases cited in the Maine response, limiting discussion to those pending in this Court, do not present the issue in this case on which a conflict exists and do not involve any other known conflict among the circuits. In the *Arkansas* case, review is sought of an Eighth Circuit decision in connection with an enforcement order but the question whether Section 401(b) embraces rulemaking orders was not litigated in or addressed by the Eighth Circuit, nor is its decision in conflict with the decision of any other circuit on the issues that were decided.[3] The other group of cases cited by Maine now pending in this Court seeks review of a decision of the Fourth Circuit in the *Virginia* case [4]; that decision did not involve any questions concerning the enforcement statute but addressed the merits of an FCC order determining to preempt depreciation regulation, and the Fourth Circuit's decision is not in conflict with any other circuit.

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[1] Section 401(b) provides for enforcement in the District Court of "any order" of the FCC (other than for the payment of money). In a prior case, this Court interpreted the same statutory language ("any order") used in a companion section of the Communications Act to include orders issued in rulemakings. *CBS* v. *United States*, 316 U.S. 407 (1942).

[2] *South Central Bell Telephone Company* v. *Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870. The appellee has filed a motion to dismiss or affirm in that case, pointing out that the case does not properly constitute an appeal under 28 U.S.C. § 1254(2).

[3] *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483.

[4] *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388 (4th Cir 1984). Review has been sought in Nos. 84-871, 84-889, 84-1054, and 84-1069.

In sum, the petition for certiorari in this case is not contingent on review of other cases and is in fact the only case that both presents a conflict between the circuits and is limited to issues relating to the conflict. Only the grant of certiorari in this case will assuredly resolve the conflict between the circuits as to whether Section 401(b) embraces rulemaking orders. Assuming that this Court agrees that this conflict warrants plenary review, the present case is clearly one in which certiorari should be granted.[5]

[5] In prior cases, this Court has sometimes followed the course of granting a narrowly focused certiorari petition to resolve a conflict and holding other cases that included the same issue. See *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984). If that course were followed here, the certiorari petition in this case to review the First Circuit's decision would be the appropriate vehicle because it focuses upon, and assures resolution of, the issue on which a conflict exists.

CONCLUSION

For the reasons stated in the petition for certiorari and in this reply, certiorari should be granted in this case.

Respectfully submitted,

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